82-1316

NO._____

In The
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DiLEO
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HUBERT J. SANTOS

Counsel of Record
51 Russ Street
Hartford, CT 06106
(203) 249-6548

QUESTION PRESENTED

1. Whether an Order permitting an Assistant U.S. Attorney to be present and examine a grand jury target at a hearing where the target wishes to establish his right to assert his Fifth Amendment privilege by establishing the existence of a small family partnership is a final judgment from which an appeal may be taken?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the order of United States Court

of Appeals for the Second Circuit entered in this proceeding on January 11, 1983.

OPINION BELOW

No opinion was issued by the Second Circuit Court of Appeals to accompany its Order of January 11, 1983 which dismissed the Petitioner's Appeal from the Order of the United States District Court for the District of Connecticut (Hon. Ellen B. Burns) dated September 17, 1982. However, the Order of the District Court and the Order of the Second Circuit Court of Appeals are reprinted in Petitioner's Appendix herein.

JURISDICTION

The Order of the Second Circuit Court of Appeals was rendered on January 11, 1983. This petition for a writ of certiorari was filed within sixty (60) days of the Order. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

28 UNITED STATES CODE § 1291

The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The Federal Grand Jury in New Haven, Connecticut, is investigating allegations of mail fraud in connection with the redemption of manufacturers' merchandising coupons. John DiLeo, Jr., is a target of the Grand Jury investigation.

In furtherance of the Grand Jury investigation, a subpoena to produce documents was issued on October 7, 1981, to DiLeo Brothers, Inc., of which John DiLeo, Jr., is President. The subpoena called for the production of certain business records. Mr. DiLeo objected to the subpoena on the ground that most of the records sought are held by a small family partnership, Royal Seal, consisting of Mr. DiLeo, his wife and mother, and that insofar as the subpoena requested documents from Royal Seal, Mr. DiLeo

asserted his Fifth Amendment privilege against self-incrimination. Mr. DiLeo did thereafter produce for the grand jury documents of DiLeo Brothers, Inc.

A second subpoena to produce documents was served on Mr. DiLeo on May 12, 1982, which asked that Mr. DiLeo produce records and documents of Royal Seal. Mr. DiLeo objected and re-asserted his Fifth Amendment privilege.

On June 7, 1982, the Assistant United States Attorney filed a motion for an in camera evidentiary hearing at which the District Court would determine the applicability of Mr. DiLeo's Fifth Amendment privilege to the documents requested in the Government's subpoena of May 12, 1982. This motion requested that the District Court follow the procedures for such an in camera proceeding as established in In Re Katz,

623 F.2d 122 (2d Cir. 1980), except that instead of the hearing being conducted ex parte, an Assistant United States Attorney theretofore unconnected with the Grand Jury investigation would be present and allowed to question Mr. DiLeo.

Mr. DiLeo objected to the proposed participation of the Assistant U.S. Attorney at the in camera proceeding on the basis that he would not be adequately protected against the further disclosure of his privileged testimony and documents.

On September 17, 1982, United States District Judge Ellen B. Burns granted the Government's Motion for In Camera Evidentiary Hearing and ordered that at that hearing an Assistant United States Attorney unconnected with the Grand Jury investigation would be allowed to participate and examine Mr. DiLeo. (Appendix

["App."] at 1A.)

On September 24, 1982, Mr. DiLeo filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit of Judge Burns' Order. On October 25, 1982, counsel for the Government filed with the Second Circuit a Motion for Dismissal of Appellant's Appeal (dated October 22, 1982) on the ground that the District Court's Order of September 17, 1982 is not a final order under 28 United States Code Section 1291. (App. at 8A). The issue of appealability was then briefed by both the Government and counsel for Mr. DiLeo.

On January 11, 1983, following oral argument, the United States Court of Appeals for the Second Circuit granted the Government's Motion for Dismissal of Appellant's Appeal. (App. at 8A.)

Although no written opinion followed, the court stated that the basis for its decision was that because Mr. DiLeo had not yet been adjudged in contempt for refusing to obey the grand jury's subpoena, his appeal was not a final decision under 28 U.S.C. Section 1291.

REASONS FOR GRANTING THE WRIT

The Order rendered by the U.S. Court of Appeals for the Second Circuit which granted the Government's Motion For Dismissal of Mr. DiLeo's Appeal is not in accord with Cohen v. Beneficial Industrial Corp., 337 U.S. 541 (1949), and its progeny.

I.

THE DISTRICT COURT'S ORDER WHICH SETS FORTH THE PROCEDURES FOR THE BELLIS/KATZ HEARING IS A FINAL ORDER UNDER 28 U.S. CODE § 1291 AND THUS APPEALABLE TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT.

The District Court's Order (App. at 1A) sets forth the procedures for the evidentiary hearing which will be held to determine whether John DiLeo, Jr. may assert the Fifth Amendment privilege against compelled self-incrimination as to particular documents and testimony under Bellis v. United States, 417 U.S. 85, 94 (1974). In Bellis, this Court recognized that members of small family partnerships may assert the Fifth Amendment privilege as to partnership records. At this hearing, Mr. DiLeo will have the burden of showing that the Royal Seal partnership is a small family partnership and that particular documents requested by the Grand Jury's subpoena are protected by the privilege.

In three respects, the procedures established by the District Court's

Order comply with the procedures adopted by the Second Circuit Court of Appeals for such hearings. See In Re Katz, 623 F.2d 122 (2d Cir. 1980). The hearing is to be held in camera, the transcript is to be sealed, and Mr. DiLeo's testimony is to be privileged. However, the District Court, at the Government's request and over objection by counsel for Mr. DiLeo, refused to comply with the Katz requirement that the hearing be held ex parte. Rather, an Assistant U.S. Attorney theretofore unconnected with the proceedings would be allowed to be present and examine Mr. DiLeo.

Mr. DiLeo's Appeal of the District Court's Order to the Second Circuit argued that the participation of the Assistant U.S. Attorney at this hearing would violate Mr. DiLeo's privilege

against self-incrimination in that the ex parte requirement of Katz is necessary to protect against leaks of privileged information. Mr. DiLeo's Appeal was dismissed, however, on the ground that 28 U.S.C. § 1291 requires that Mr. DiLeo must first be held in contempt or a final judgment enter before he may appeal the District Court's Order.

Interlocutory appeals are generally disallowed under 28 U.S.C. § 1291. See, e.g., United States v. Hollywood Motor Car Co., _____U.S._____, 102 S.Ct. 3081 (1982). As this Court has stated,

> insistence on finality and prohibition of piecemeal review discourage[s] undue litigiousness and leaden-footed administration of justice, ...

DiBella v. United States, 369 U.S. 121, 124 (1962).

Cohen v. Beneficial Industrial Corp.,

337 U.S. 541 (1949), however, held that an exception to the final judgment rule embodied in 28 U.S.C. § 1291 exists for "collateral orders." Such orders

> must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). See also Helstocki v. Meanor, 442 U.S. 500 (1979); Abney v. United States, 431 U.S. 651 (1977); Stack v. Boyle, 342 U.S. 1 (1951). The District Court's Order in the instant action meets the three Cohen tests and, thus, is appealable prior to final judgment or the entering of an order of contempt. A discussion of the three Cohen criteria as applied to the District Court's Order follows.

The first Cohen criterion is that the issue which is the subject of the Order must have been decided conclusively by the trial court. In short, this means that further proceedings or evidence are not helpful or necessary.

In United States v. McDonald, 435 U.S. 850 (1978), this Court held that the denial of a pretrial motion to dismiss on speedy trial grounds did not pass the "conclusiveness" test of Cohen. The basis for the McDonald decision was that a speedy trial claim can only be decided after trial. The four factors to be considered in such a claim, i.e., the length of the delay, the reason for the delay, whether the defendant has properly asserted his right and prejudice to the defendant from the delay, can only be considered after the relevant facts have been presented at trial:

> Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial -- when prejudice can be better gauged -- would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention . . . .

Id. at 858-59.

Unlike the speedy trial claim in McDonald, the District Court's Order in the instant action is final and complete. The procedures for Mr. DiLeo's Bellis/Katz hearing have been conclusively established. No evidence presented at the Bellis/Katz hearing will be germane to what type of proceeding is appropriate.

In this sense, the District Court's Order is closer to the District Court's

Order in Cohen. In Cohen the Plaintiff, by way of diversity jurisdiction, brought a shareholder derivative action. The corporate Defendant moved for an order requiring the Plaintiff to post security for the Defendant's expenses and attorney's fees under a state statute. The District Court held that the state security statute did not apply and the Defendant appealed to the U.S. Court of Appeals, which reversed. The United States Supreme Court affirmed the Court of Appeals and held that the District Court's denial of the pre-trial motion was appealable because

> it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. (Emphasis added.)

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949).

The second Cohen criterion is that the issue which is the subject of the appeal must be collateral or separate from the merits of the action. For example, in Cohen the appeal concerned the applicability of a state statute which required the Plaintiff to post security for the Defendant's expenses of litigation; it had nothing to do with the merits of the action, i.e., whether the Defendants had committed fraud against the corporation.

In the instant action, the procedures for the hearing set forth in the District Court's Order have nothing to do with the questions which will be addressed at the Bellis/Katz hearing. These questions are whether Royal Seal is a small family partnership and, if so, is particular evidence protected by the Fifth Amendment privilege.

The final Cohen criterion is that the claim or issue must "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). See also United States v. Hollywood Motor Car, Co., _____U.S._____, 102 S.Ct. 3081 (1982)(denial of pretrial motion to dismiss on basis of prosecutorial vindicativeness does not satisfy final Cohen criterion).

Mr. DiLeo's claim that his Fifth Amendment right would be jeopardized by the participation of the Assistant U.S. Attorney at the Bellis/Katz hearing would be unreviewable if he were forced to be held in contempt or await final judgment.

If Mr. DiLeo were not to have this question decided at this juncture, he would be forced to decide at the Bellis/

Katz hearing between two courses of action. He could present evidence and attempt to meet his burden of proving that Royal Seal is a small family partnership and thus abandon his claim that the hearing should be ex parte; or, he could refuse to present evidence, thus failing to meet his burden of proving that Royal Seal is a small family partnership and that particular evidence is protected by the Fifth Amendment privilege. If he chooses this latter course, the District Court will make a factual finding that Royal Seal is not a small family partnership. Mr. DiLeo will then again invoke the Fifth Amendment privilege before the grand jury, refuse to answer their questions or produce requested documents and be ordered in contempt. Only at that point will he be able to appeal to the Second Circuit.

The problem faced by Mr. DiLeo in taking this second course is that even though he may appeal following the contempt order, his failure to meet his factual burden of establishing that Royal Seal is a small family partnership at the Bellis/Katz hearing may foreclose him from ever presenting evidence on the issue. Thus, he will be effectively prevented from meaningful appellate review. This fear may even induce him to choose the former course of action; that is, abandoning his claim that the participation by the Government violates his Fifth Amendment privilege. In so choosing, Mr. DiLeo will have implicitly consented to a proceeding which is clearly in violation of the Second Circuit rule, established in In Re Katz, 623 F.2d 122 (2d Cir. 1980), that such

proceedings are to be conducted without the participation of the Government. The final decision rule should not be invoked so as to so chill the exercise of a right as fundamental as the Fifth Amendment privilege against self-incrimination.

Apart from satisfying the Cohen criteria, this Court has recognized that it is not always necessary for a contempt order to issue in order to challenge a grand jury request for information which may be subject to a privilege. In Perlman v. United States, 247 U.S. 7 (1918), this Court held that where a subpoena is directed to a third party, the movant who claims that production of the subpoenaed material is privileged is permitted an immediate appeal. The rationale is that the third party will

not be expected to risk a contempt citation and will produce the requested information, thus precluding effective appellant review at a later stage. Maness v. Meyers, 419 U.S. 449, 463 (1975).

Perlman and Maness represent a realistic approach to the issue of appealability of orders which concern disclosure of privileged information in grand jury proceedings. Justice Jackson, in Cohen, agreed with this view and stated:

> This Court has long given this provision of the statute [28 U.S.C. § 1291] this practical rather than a technical construction.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). See also United States v. Nixon, 418 U.S. 683, 690-93 (1974)(President of United

States should not be required to be held in contempt simply to trigger appellate review).

In sum, the District Court's Order which established the procedures for the Bellis/Katz hearing meets the Cohen criteria for appealability of collateral orders. A practical application of these criteria demonstrates the need for pre-hearing review in order to preserve Mr. DiLeo's Fifth Amendment right against compelled self-incrimination.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

THE PETITIONER

By Hubert J. Santos
A Member of the Bar
of the Supreme Court
of the United States